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No. 99-951

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term 1999

R. R. AND BARBARA ANDERSON
Petitioner,

v.

FORD MOTOR COMPANY
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY TO THE BRIEF IN OPPOSITION

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TABLE OF CONTENTS

REPLY BRIEF OF PETITIONERS

Table of Contents i

Table of Authorities ii

I. THE *OLANO* HOLDING EXTENDS TO QUESTIONS OF JUROR MISCONDUCT GENERALLY, NOT MERELY THOSE STEMMING FROM THE PROVISIONS OF FEDERAL RULE OF CRIMINAL PROCEDURE 52(b). 1

II. THE DISTRICT COURT'S POST-TRIAL COMMENTS CONCERNING THE VERDICT ILLUSTRATE THAT THE VERDICT WAS NOT ALTERED DUE TO THE JUROR'S OUT-OF-COURT TEST. 3

III. CONCLUSION 4

TABLE OF AUTHORITIES

Judicial Decisions

Artis v. Hitachi Zosen Clearing, Inc.,
967 F.2d 1132, 1142 (7th Cir. 1992) 1

Banghart v. Origoverken, A.B.
49 F.3d 1302, 1306 (8th Cir. 1995) 1

Kilgore v. Greyhound Corp.,
30 F.R.D. 385 (E.D. Tenn. 1962) 2

U.S. v. Olano,
507 U.S. 725, 113 S.Ct. 1770, 123 . . . . . 1, 2
L.Ed 2d 508 (1993)

Statutory Provisions

Fed.R. Crim.Proc. 52(b) 1, 2

REPLY BRIEF OF PETITIONERS

I. THE *OLANO* HOLDING EXTENDS TO QUESTIONS OF JUROR MISCONDUCT GENERALLY, NOT MERELY THOSE STEMMING FROM THE PROVISIONS OF FEDERAL RULE OF CRIMINAL PROCEDURE 52(b).

The respondent suggests an unjustifiably narrow reading of *U.S. v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed 2d 508 (1993) to encompass only its precendential value in the context of Fed.R. Crim.Proc. 52(b). Respondent's position overlooks the plain language of *Olano* regarding a necessity that post-trial relief be predicated on a showing that the verdict was altered due to prejudicial conduct. 507 U.S. at 739.

The logic of *Olano* recognizes that the potential for prejudice stemming from juror misconduct certainly exists. However, *Olano* also recognizes that not every instance of misconduct is *a priori* prejudicial. This "no harm, no foul" analysis was the law in the Eighth Circuit prior to the instant case. *See Banghart v. Origoverken, A.B.*, 49 F.3d 1302, 1306 (8th Cir. 1995). Now, the Eighth Circuit has adopted the "reasonable possibility" standard from *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142 (7th Cir. 1992).

Respondent's position is contrary to a long line of precedent which has stood the test of time. For example, in *Kilgore v. Greyhound Corp.*, 30 F.R.D. 385 (E.D. Tenn. 1962), a juror's out-of-court test precipitated his unsuccessful attempt to sway other jurors. *Id.* at 382. His attempt was futile because the other jurors "would have been naive indeed to have accepted as 'expert testimony' [the juror's] conclusions from his experiences outside of court." *Id.*, at 387.

The instant case, like *Kilgore*, lacks any indication that juror Willis's out-of-court experiences altered the verdict. Unlike *Kilgore*, there is no indication that Mr. Willis even made any attempt to sway other jurors.

If the Eighth Circuit decision herein stands, a "hair trigger" standard for post-trial relief will be established. This precedent will require only a showing that a juror violated an instruction to justify a new trial. No showing of an impact on the verdict is now required in the Eighth Circuit. When all that is required is that there be a reasonable possibility that the extraneous communication altered the verdict, it follows that the number of new trials will increase for no good reason. The *Olano* standard means much more than an interpretation of F.R.Crim.Proc. 52(b); it protects jury verdicts from unwarranted post-trial relief.

II. THE DISTRICT COURT'S POST-TRIAL COMMENTS CONCERNING THE VERDICT ILLUSTRATE THAT THE VERDICT WAS NOT ALTERED DUE TO THE JUROR'S OUT-OF-COURT TEST.

The petitioners' inclusion of the district court's statement indicating that even without the out-of-court test, the "jury was inclined to find in plaintiffs' favor" is not an attempt to dispute or taint the findings in the new trial order. Rather, it is included in petitioners' brief to illustrate the consequences of setting a significantly lower threshold for post-trial relief. The Eighth Circuit's opinion allowed the district court to grant relief, not because the out-of-court test caused the eventual verdict, but simply because it was done in violation of the court's instructions. 186 F.3d at 921.

On a question of the prejudicial impact of juror misconduct, the subject comment by the district court is germane to the issue of whether the out-of-court test altered the verdict.

III. CONCLUSION

This Court should grant this petition to re-establish the proper standards for post-trial relief in the context of juror misconduct.

Respectfully submitted,

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